

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

STEPHEN MICHAEL FLEMING,

Petitioner,

v.

Case Number: 04-72365

LINDA METRISH,

Honorable Arthur J. Tarnow

Respondent.

/

**ORDER GRANTING RESPONDENT’S MOTION FOR STAY PENDING
APPEAL [27]**

Petitioner, Stephen Fleming, is a state inmate currently incarcerated by the State of Michigan, pursuant to a conviction for second-degree murder and felony firearm. On September 28, 2007, this Court issued an opinion and order granting Petitioner’s request for a writ of *habeas corpus*. The Court directed Respondent to release Petitioner from custody or institute proceedings to retry him within ninety days of the date of the order. Respondent has filed a motion to stay the order pending appeal. Petitioner has responded.

Federal Rule of Appellate Procedure 23(c) provides that, while a decision ordering the release of a prisoner is on appeal, “the prisoner must – unless the court or judge ordering the decision, or the court of appeals, or the Supreme Court, or a

judge or justice of either court orders otherwise – be released on personal recognizance, with or without surety.” The United States Supreme Court has held that a federal court should consider the following factors in deciding whether to stay an order granting habeas corpus relief pending appeal:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

A federal court may also consider “[t]he State’s interest in continuing custody and rehabilitation pending a final determination of the case on appeal . . . ; it will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served.” *Id.* at 777. Petitioner’s sentence is life years imprisonment for the second-degree murder conviction, to be served consecutively to two years imprisonment for the felony-firearm conviction, and much of it remains to be served.

With respect to the remaining *Hilton* factors, the Court notes that Petitioner may be injured by his continued confinement pursuant to a conviction this Court has found to be constitutionally infirm. On the other hand, it would be a waste of

judicial resources for the appeal to proceed in the Sixth Circuit Court of Appeals, while simultaneously requiring the State to retry Petitioner.

Considering the factors enumerated in *Hilton*, the Court holds that a stay pending appeal is appropriate in this case.

Accordingly, **IT IS ORDERED** that Respondent's Motion for Stay Pending Appeal is **GRANTED** and this Court's Opinion and Order Granting Petitioner's Request for *Habeas Corpus* Relief is **STAYED PENDING DISPOSITION OF THE APPEAL** pending in the United States Court of Appeals for the Sixth Circuit. The Court grants the stay without prejudice to Petitioner's right to request reconsideration at a later date or to file a motion for bond pending appeal.

IT IS FURTHER ORDERED that, unless a new trial is scheduled within **SIXTY (60) DAYS** of the issuance of the mandate by the Sixth Circuit Court of Appeals, Petitioner must be unconditionally released.

s/Arthur J. Tarnow
Arthur J. Tarnow
United States District Judge

Date: November 19, 2007

I hereby certify that a copy of the foregoing document was served upon counsel of record on November 19, 2007, by electronic and/or ordinary mail.

s/Catherine A. Pickles
Case Manager